MALAYSIAN ASSURANCE ALLIANCE BHD

v.

CHONG NYUK LAN

HIGH COURT SABAH AND SARAWAK, TAWAU
RICHARD MALANJUM J
[CIVIL APPEAL NO: T(12)-06-2001]
20 AUGUST 2002

INSURANCE: *Life insurance - Reinstatement of policy - Whether constituted new contract - Payment of policy - Computation of - Whether to start from date of reinstatement or original date of issuance - Insurance Act 1996, s. 147(4)*

The deceased had signed for a life insurance policy on 1 February 1994. On 19 March 1996 the policy premium was not paid thereby resulting in the policy having lapsed. The deceased was therefore required to sign a Long Form Health Certificate (LFHC) as a statement of the deceased that his health was not impaired in any way. Thereupon the policy was reinstated. On 1 October 1997, the deceased was pronounced dead following a heart attack. A claim for the payment of the policy by the respondent/plaintiff was rejected by the appellant/defendant.

The appellant/defendant argued that a reinstatement of a policy constituted a new contract and thus computation of the two years period should start from the reinstatement date and not from the original date of issuance of the policy. The respondent/plaintiff argued that s. 147(4) of the Insurance Act 1996 ('the Act') applied and that computation of the two years period should start from the time the policy was originally effected. The appellant/defendant appealed against the decision of the sessions court judge which had allowed the plaintiff's claim and submitted that there was a fatal non-disclosure of material fact, namely, that the deceased was suffering from hypertension and elevated cholesterol level in the LFHC.

Held:

[1] The computation of the two years period should start from the time the policy was originally effected regardless of lapse or renewal of said policy. The appellant/defendant should be precluded from contesting the validity of the policy on the grounds of false and non-disclosure of material fact unless fraud is alleged, which the appellant/defendant did not pursue. Thus

it should not be allowed to have the benefit of the second limb of the said s. 147(4) of the Act and the issue of non-disclosure of material fact should not arise at all. (p 250 a-c)

[Appeal dismissed.]

Case(s) referred to:
Chong Khee Sang v. Pang Ah Chee [1984] 1 MLJ 377 ***(refd)***
Eng Mee Yong v. Letchumanan [1979] 2 MLJ 212 ***(refd)***
Handler v. Mutual Reserve Fund Life Association [1904] LT 192 **(refd)**
Jafaar Shaari & Anor v. Tan Lip Eng & Anor [1997] 4 CLJ 509 ***(refd)***
Leong Kum Whay & Anor v. American International Assurance Ltd [1999] 5 CLJ 11 ***(refd)***
Mithoolal v. Life Insurance Corporation of India [1962] AIR 814 ***(refd)***
The National Mutual Life Association of Austral-Asia v. Kidman (1905-1906) Commonwealth Law Reports Vol 3 160 ***(refd)***
Tay Kheng Hong v. Heap Moh Steamship Co Ltd [1964] MLJ 87 ***(refd)***

Legislation referred to:
Insurance Act 1963, s. 15C(4)
Insurance Act 1996, s. 147(4)

Insurance Act 1938 [India], s. 45

For the appellant - Brenndon Soh; M/s Ronny Cham & Co
For the respondent - Henry Lim; M/s Shim Pang & Co

[The appellant/defendant has appealed to the Court of Appeal vide Civil Appeal No: S-08-245 of 2002.]

Reported by Suhainah Wahiduddin

JUDGMENT

Richard Malanjum J:
The matter before me is an appeal by the appellant/defendant against the decision of the learned sessions court judge Tawau given on 14 April 2001 allowing the claim of the plaintiff as an Administrator of the Estate of Liew Kin On, deceased.

There is also a cross-appeal by the respondent/plaintiff against the finding of the trial judge wherein it was ruled that s. 147(4) of the Insurance Act 1996 (the Act) has no application to the present case.

It was the contention of learned counsel for the respondent/plaintiff that s. 147(4) of the Act should apply and if the correct interpretation of the section is given coupled by the fact that the appellant/defendant abandoned the plea of fraud prior to the commencement of the trial then there should be no longer

any doubt on the entry of the judgment for the respondent/plaintiff by the trial judge *albeit* for a different reason. And it was further submitted that the determination of this issue should dispose of the appeal proper.

There is also a preliminary objection taken up by the learned counsel for the respondent/plaintiff against the appeal proper on the basis that it suffered a fatal defect namely the attempt to include documents (pp. 143-147 of the Appeal Record) that were not admitted as exhibits.

In response to these attacks learned counsel for the appellant/defendant argued that those documents that were said to be not part of the exhibits of the case should be considered as having been admitted since they were referred to during the trial and were in the bundle of agreed documents with the existence not in dispute although the contents were not agreed.

As for the appeal proper learned counsel for the appellant/defendant submitted that this court although an appellate court should interfere with the findings of facts by the trial court since they were not based on the credibility of the witnesses called but on the cold prints of the documentary evidence. And it was further submitted that there were enough justification to come to a finding that there was a fatal non-disclosure of material fact, namely, that the deceased was suffering from hypertension and elevated cholesterol level, in the Long Form Health Certificate submitted for the reinstatement of the insurance policy of the deceased.

In respect of the cross-appeal of the respondent/plaintiff it was submitted for the appellant/defendant that the reinstatement of the insurance policy constitute a new contract and thus the provision of s. 147(4) of the Act did not apply.

Briefly the following facts were not in dispute, namely, that on 22 February 1994 the deceased signed for a life insurance policy for the sum of RM200,000 that commenced on 1 February 1994 and would have matured on 1 February 2056 or payable upon his death to his nominated beneficiary. The policy premium was payable annually in advance.

On 1 February 1996 the premium was payable but it was not paid until 19 March 1996 thereby resulting in the policy having lapsed. The deceased was therefore required to sign a Long Form Health Certificate with cl. 6 therein as a statement of the deceased that his health was not impaired in any way. Thereupon the policy was reinstated *vide* a letter from the appellant/defendant dated 24 September 1996 to take effect from 19 September 1996.

On 1 October 1997 the deceased was pronounced dead following a heart attack a day earlier. A claim for the payment of the policy of the deceased by the respondent/plaintiff was rejected by the appellant/defendant culminating in the suit being commenced.

Meanwhile it was in evidence that in 1997 the deceased saw Dr Edward Sia (DW2) complaining of heart palpitations. It was also the testimony of DW2 that the deceased informed him of his taking medication for hypertension. However it was the finding of the trial judge, *inter alia*, that DW2 could not be certain as to when the diagnosis for the hypertension and elevated cholesterol was carried out and when such ailments were actually detected and hence it was concluded that the appellant/defendant failed to prove on the balance of probabilities that there was a non-disclosure of material fact on the part of the deceased.

Having perused the materials before me and having considered the respective contentions of learned counsel for the parties I am of the view that I should first deal with the issue raised in the cross-appeal of the respondent/plaintiff. I am inclined to agree that s. 147(4) of the Act is relevant in the determination of the appeal proper. The Act is applicable to begin with as it came into force on 1 January 1997. Prior to the Act there was the Insurance Act 1963. But even that legislation was amended initially with s. 15C(4) wherein the contestability refer to the time which the policy was issued or reinstated by the insurer and the period was for three years. That was subsequently re-amended and to take effect from 1 April 1978 wherein the earlier reference to time of issuance was deleted and replaced with the phrase 'the time the policy was effected'. And that was kept by the Act in s. 147(4).

Now s. 147(4) of the Act reads:

> (4) A licensed life insurer shall not dispute the validity of a life policy after the expiry of two years from the date on which it was effected on the ground that a statement made or omitted to be made in the proposal for insurance or in a report of a doctor, referee, or any other person, or in a document leading to the issue of the life policy, was inaccurate or false or misleading unless the licensed life insurer shows that the statement was on a material matter or suppressed a material fact and that it was fraudulently made or omitted to be made by the policy owner.

In the case of reinstatement of an insurance policy the crucial question is: under s. 147(4) of the Act when is the effective period of the policy? If it is from the time of the original issuance of the policy and that reinstatement does not create a new contract then it would mean that the computation of the two years period under that section is quite a disadvantage to an insurer.

Learned counsel for the appellant/defendant argued that a reinstatement of a policy constituted a new contract and thus computation of the two years period should start from the reinstatement date and not from the original date of issuance of the policy. He relied on the following cases:

(i) *Handler v. Mutual Reserve Fund Life Association* [1904] LT 192:

(ii) *The National Mutual Life Association of Austral-Asia v. Kidman* (1905-1906) Commonwealth Law Reports Vol. 3 160:

(iii) *Wicken's The Law of Life Insurance in Australia*, 6th edn 1990.

For the respondent/plaintiff the cases of *Mithoolal v. Life Insurance Corporation of India* [1962] AIR 814 and *Leong Kum Whay & Anor v American International Assurance Ltd* [1999] 5 CLJ 11 were referred to in support of the contention that the computation of the two years period as stipulated in the said section should start from the original date the policy was effected.

In respect of *Mithoolal*'s case *(supra)* the Indian Supreme Court was considering s. 45 of the Indian Insurance Act 1938. That section reads:

> No policy of life insurance effected before the commencement of this Act shall after the expiry of two years from the date of commencement of this Act and no policy of life insurance effected after the coming into force of this Act shall, after the expiry of two years from the date on which it was effected, be called in question by an insurer on the ground that a statement made in the proposal for insurance or in any report of a medical officer or referee, or friend of the insured, or in any other document leading to the issue of the policy, was inaccurate or false, unless the insurer shows that such statement was on a material matter or suppressed facts which it was material to disclose and that it was fraudulently made by the policy-holder and that the policy-holder knew at the time of making it that the statement was false or that it suppressed facts which it was material to disclose ... .

The foregoing section is in *pari material* with s. 147(4) of the Act. And the Indian Supreme Court when interpreting s. 45 in *Mithoolal*'s case *(supra)* stated thus:

> Whether the revival of a lapsed policy constitutes a new contract or not for other purposes, it is clear from the wording of the operative part of s. 45 that the period of two years for the purpose of the section has to be calculated from the date on which the policy was originally effected ... .

Similarly in *Leong Kum Whay*'s case *(supra)* it was held that for the first insurance policy the computation of the two years period for the purpose of the re-amended s. 15C(4) of the 1963 Act should be from the original date it was first effected. Of course in that case there was no question of reinstatement of the policy and hence the court was not troubled with the issue of whether there was a new contract created.

Having given serious consideration to the opposing contentions of learned counsel for the parties I am inclined to accept the position of the law as regards s. 147(4) of the Act as interpreted in *Mithoolal*'s case *(supra)* and that is to

say that the computation of the two years period should start from the time the policy was originally effected regardless of lapse or renewal of the said policy.

Accordingly in the present case the policy was effected on 1 February 1994 and the claim for payment came in 1997 with the death of the insured. The two years period has definitely expired. And the appellant/defendant should be precluded from contesting the validity of the policy on the ground of false and non-disclosure of material fact unless fraud is alleged. In this case there is no denial that the appellant/defendant in its defence did not pursue the assertion of fraud on the part of the insured/deceased. Thus it should not be allowed to have the benefit of the second limb of the said s. 147(4) of the Act.

For the foregoing reason alone, I should dismiss this appeal.

In the event that I am wrong and that s. 147(4) is not applicable I am also of the view that this appeal should be dismissed in that the conclusion of the trial court was derived from findings of facts as mentioned hereinabove based on the evidence adduced before it. As an appellate court this court should be slow in reversing such findings. And having perused the materials that learned counsel for the appellant/defendant urged this court to consider, I am not convinced that there is justification for this court to interfere with the findings of facts by the trial court, (see: *Eng Mee Yong v. Letchumanan* [1979] 2 MLJ 212: *Tay Kheng Hong v. Heap Moh Steamship Co Ltd* [1964] MLJ 87).

As regards the documents that learned counsel for the appellant/defendant requested this court to consider as exhibits, I am of the view that they should not be admitted as such since they were not properly introduced and tendered during the trial. To do so now at the appellate stage would be highly prejudicial to the opposing party as it would be deprived of the opportunity to further examine its maker or those who had dealt with them. And I do not think the position of those documents in this case could be distinguished from those in the case of *Chong Khee Sang v. Pang Ah Chee* [1984] 1 MLJ 377. Indeed even in the case of *Jafaar Shaari & Anor v. Tan Lip Eng & Anor* [1997] 4 CLJ 509 the requirement of mutual agreement of the parties was a condition precedent before the formality in the tendering of documents as exhibits could be relaxed. Hence in the present case since there was no document properly tendered as an exhibit to substantiate the assertion and allegation by the appellant/defendant the issue of non-disclosure of material fact should not arise at all.

This appeal of the appellant/defendant should therefore be dismissed with costs and the cross-appeal by the respondent/plaintiff is allowed.